Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

September 2004

When mailing a statutory offer to settle, you must do so at least 15 days before trial. *California Code of Civil Procedure* § 998(b) requires that a statutory offer to compromise be served at least 10 days before the trial or arbitration. *Civ. Proc.* § 1013(a) provides that where service is by mail, the recipient's time to respond is extended by five calendar days (assuming service is in California – longer if mailed elsewhere). Therefore, *Lecuyer v. Sunset Trails Apartments* (Cal. App. Fourth Dist, Div. One, July 21, 2004) 120 Cal.App.4th 920, [16 Cal.Rptr.3d 169, 2004 DJDAR 8851] held that an offer to compromise served by mail 13 days before the trial started did not entitle the offering parties to recover the sanctions provided under § 998.

Court cannot avoid ruling on evidentiary objections before ruling on a motion for summary judgment. *Vineyard Springs Estates, LLC v. Superior Court* (Cal. App. Third Dist., July 12, 2004) 120 Cal.App.4th 633, [15 Cal.Rptr.3rd 587, 2004 DJDAR 8454] reversed an order denying summary judgment where the trial court had failed to rule on evidentiary objections raised by the moving party to the opposition's evidence. The case was remanded for the trial court to rule on the objections and thereafter reconsider the motion. *See also, Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 235-238, [114 Cal.Rptr.2d 151, 2001 DJDAR 12689]; *City of Long Beach v. Farmers & Merchants Bank of Long Beach* (2000) 81 Cal.App.4th 780, 784, [97 Cal.Rptr.2d 140, 2000 DJDAR 6553].

Trial court's refusal to continue hearing because of lawyer's illness is error. Stating "[t]here are times when respect for the human condition dictates a compassionate response to a request for a continuance," the Fourth District Court of Appeal reversed a summary judgment where the opposing lawyer had lacked sufficient time to prepare an adequate response because he only became aware of the motion two business days before the response was due, on the day he was released from the hospital after major surgery. *Lerma v. County of Orange* (Cal. App. Fourth Dist., Div. Three, July 13, 2004) 120 Cal.App.4th 709, [15 Cal.Rptr.3d 609, 2004 DJDAR 8493].

Shortly after the *Lerma* case, another appellate court reversed a judgment holding that the trial court should have granted a continuance where a party's lawyer was engaged in another trial. *Oliveros v. County of Los Angeles* (Cal. App. Second Dist., Div. Five, July 28, 2004) 120 Cal.App.4th 1389 [2004 Cal. App. LEXIS 1238, 2004 DJDAR 9287].

Nota Bena: Because of requirements imposed by the Trial Court Delay Reduction Act, some trial judges have become increasingly reluctant to continue matters based on the unavailability of lawyers. Apparently the appellate courts are taking note of this trend and expressing their disapproval of a system that considers speed in the disposition of cases as its primary goal. In our May newsletter we reported a third case where the trial court had denied a continuance because of the death of the lawyer who had been handling the case and the appellate court issued a writ ordering the trial continued. *Hernandez v. Superior Court* (Cal. App. Second Dist. February 23, 2004, As Modified, February 24, 2004) 115 Cal.App.4th 1242, [9 Cal.Rptr. 3d 821].

Nota Bena: See also, *Polibrid v. Sup. Ct. (SSC Construction)* (As Modified October 21, 2003) 112 Cal.App.4th 920, [6 Cal.Rptr.3d 7, 2003 DJDAR 11595], stating that the State fast track rule is merely a "goal" and courts are only directed that they "should" process cases within two years of filing. Making it clear that courts have the power to exempt a case from the time disposition goals, if the request for a continuance involves exceptional circumstances.

Filing a SLAPP suit may be expensive even if the complaint is dismissed. In *S. B. Beach Properties v. Berti* (Cal. App. Second Dist., Div. Six, July 22, 2004) 120 Cal.App.4th 1001, [16 Cal.Rptr,3d 204, 2004 DJDAR 8951], plaintiff dismissed their SLAPP suit (Strategic Lawsuit Against Public Participation; *See, Code of Civ. Proc.* §§ 425.16 & 425.17) after defendant filed an answer, but before he

Litigation Section Events

The Litigation Section is presenting 12 programs for MCLE credit at the State Bar Annual Meeting.

October 7–10, 2004
Monterey, CA

For registration and information visit www.calbar.ca.gov/annualmeeting

Section Education Institute

January 28–30, 2005
Palace Hotel
San Francisco, CA

See Website for Details:
www.calbar.ca.gov/SEI

Annual Trial Symposium

April 15–17, 2005
Silverado Country Club and Resort
Napa Valley, CA

Details Available on Website Soon

filed a threatened anti-SLAPP motion. Nevertheless, the court ruled that the court retained jurisdiction to rule on the motion and to award attorney fees to defendant.

Although complaint filed by self-represented corporation is void, defect may be cured. The trial court struck a complaint filed by corporation not represented by a lawyer. Before the motion to strike was granted, but after the statute of limitations had run on the claim, the corporation filed a substitution of attorneys, substituting a law firm as its attorneys of record. The Court of Appeal held that, although the complaint as filed was void, the order of dismissal must be reversed. A trial court has discretion to strike a pleading not filed in conformity with the law, (*Code of Civ. Proc.* § 436) but, it was an abuse of discretion not to permit the defect to be cured. *CLD Construction, Inc. v. City of San Ramon* (Cal. App. First Dist., Div. Five, July 23, 2004) 120 Cal.App.4th 1141 [2004 DJDAR 9056].

Non-profit corporation must register with state bar or forfeit attorneys' fees. *Frye v. Tenderloin Housing Clinic, Inc.* (Cal. App. First Dist., Div. Four, July 27, 2004) 120 Cal.App.4th 1208 [2004 DJDAR 9155] held that a not-for-profit corporation must be register with the state bar before it may obtain attorney fees. Because the non-profit corporation defendant had failed to registered with the state bar, the court ordered it to disgorge the fees it had received. The court also noted that such a corporation is only eligible for registration if its board of directors are only comprised of lawyers. The *Fry* court distinguished *Olson v. Cohen* (2003) 106 Cal.App.4th 1209, [131 Cal.Rptr.2d 620, 2003 DJDAR 2821], which held that the failure of a law corporation to register with the state bar did not entitle the client to a return of attorney fees in the absence of the client's reliance on the existence of a corporate entity, or injury caused by the corporation's delinquency.

Nota Bena: The Los Angeles Daily Journal (July 28, 2004) reports that very few non-profits that provide legal services are registered with the state bar. Unless the Supreme Court grants a petition for hearing, the ruling will probably require legal aid organizations to now limit their boards of directors to lawyers and to register with the state bar. Even if such review is requested and granted, such organizations may act at their peril in not complying with the Court of Appeal directive while the case is pending.

In insurance bad faith cases, the insured may only recover attorney fees for work done to recover the policy benefits. Our Supreme Court held that, where insureds recover both policy benefits and tort damages in an action for breach of the covenant of good faith and fair dealing, they may only be awarded attorney fees, (so-called "Brandt fees;" *See, Brandt v. Superior Court* (1985) 37 Cal.3d 813, [693 P.2d 796, 210 Cal.Rptr. 211]), for legal work done in connection with the contract claim. The court remanded the judgment to the trial court to recalculate fees where the court had apparently awarded fees based on all the legal work done in the case, including the tort causes of action. *Cassim v. Allstate Insurance Company* (Cal.Supr.Ct., July 29, 2004) [2004 Cal.LEXIS 6832, 2004 DJDAR 9267].

Failure to meaningfully participate in judicial arbitration may be cause for sanctions. In *Rietveld v. Rosebud Storage Partners, L.P.* (Cal. App. Third Dist., July 30, 2004) [2004 Cal.App.LEXIS 1260, 2004 DJDAR 9434] the court ordered judicial arbitration. Plaintiff's lawyer failed to file documents, ordered to be filed before the arbitration, showed up late at the arbitration, did not have the clients available, and presented no evidence. After the arbitrator ruled for defendant, plaintiff demanded a trial *de novo*. Ultimately the court granted summary judgment in favor of defendant and awarded sanctions against plaintiff's lawyer because of his failure to participate in the arbitration in a meaningful manner. The Court of Appeal affirmed the sanction order. The court relied on a local court rule authorizing the award of sanctions for "willful failure to meaningfully participate in arbitration proceedings."

Seventy-five percent (75%) of punitive damages will go to the State; but lawyers will get their fee. Larry Doyle, the State Bar's legislative representative, reported that, as part of the current state budget package, a new statute provides that, with respect to an action filed after the effective date of the bill (SB 1102), seventy-five percent (75%) of any judgment, or settlement for punitive damages will be apportioned twenty-five percent (25%) to the plaintiff and seventy-five percent (75%) to the state. The bill, which sunsets on June 30, 2006, provides that, twenty-five percent (25%) of the moneys paid to the state will be appropriated for attorney fees. Presumably, the attorney fee derived from the portion of the award that goes to the client, will be determined by the contract between lawyer and client.

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Jury Instructions

We would like to hear about any problems or experiences you've had with the new jury instructions. Please provide your comments by sending them to Paul Renne at PRenne@cooley.com or to Rick Seabolt at RLSeabolt@HRBlaw.com